UNIVERSITY OF WASHINGTON
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EXPLANATORY NOTES

TRANSCRIPT OF ACADEMIC RECORD
The transcript is an academic record of all coursework completed at the University of Washington-Seattle, Bothell and Tacoma.

AUTHENTICATION OF THIS TRANSCRIPT:
A transcript is official when it bears the facsimile signature of the Registrar, the University of Washington Seal, and the production date. The background of this transcript is purple and the Registrar's signature is purple. Further authentication may be obtained by calling the UW Registration/Transcript Office at (206) 543-8580. The institutional name and the word COPY appear on alternative rows as a latent image. When this paper is touched by fresh liquid bleach, an authentic document will stain brown.

ACADEMIC CALENDAR:
The academic year is comprised of three quarters – autumn, winter, spring – each lasting approximately eleven weeks. There is also a summer quarter.

EXPLANATION OF GRADE SYMBOLS:
Numeric grades: 4.0, 3.9, decreasing by 1/10 to 0.7, 0.0. The highest grade is 4.0. Lowest passing grade is 0.7 (undergraduates), 1.7 (graduate students).

Letter grades: I (incomplete); N (satisfactory without grade), S (passing grade for courses taken on a satisfactory/not-satisfactory basis), for undergraduate students 2.0 and above but prior to autumn 1985 1.7 and above; for graduate students 2.7 and above. NS (not satisfactory grade for courses taken on a satisfactory/not satisfactory basis), for undergraduate students a grade less than 2.0 but prior to autumn 1985 a grade less than 1.7; for graduate students a grade less than 2.7. CR (credit awarded in a course offered on a credit/no credit basis only). The minimum performance level required for a CR grade is determined, and the grade is awarded directly, by the instructor. NC (credit not awarded in a course offered on a credit/no credit basis only); W (official complete withdrawal from the University, or course drop); beginning autumn 1990 for undergraduate and autumn 1997 for graduate and professional students through summer 2020, W accompanied by a number of 3 through 7 (designates course dropped week 3 through week 7 of all quarters except summer quarter) through summer 2020; *W (prior to autumn 1990, a peremptory drop made during the fifth through tenth week of the quarter); HW (Hardship Withdrawal - through winter 2020); RD (Registrar Drop) Beginning spring 2020 for undergraduate, graduate, and professional students, designates course(s) dropped after second week of the quarter and course(s) dropped after grades were posted; X (no grade submitted by instructor). Course titles preceded by the letter H designate honors courses, W designate writing courses, S designate service learning courses, and R designates a course with a research component. The COVID-19 outbreak, a global public health emergency, impacted enrollment for specific quarters indicated with a comment within each quarter on the front of the transcript.

UNDERGRADUATE NUMERIC GRADE POINT EQUIVALENTS:
4.0-3.9 (A); 3.8-3.5 (A-); 3.4-3.2 (B+); 3.1-2.9 (B); 2.8-2.5 (B-); 2.4-2.2 (C+); 2.1-1.9 (C); 1.8-1.5 (C-); 1.4-1.2 (D+); 1.1-0.9 (D); 0.8-0.7 (D-); 0.0 (E).

GRADUATE NUMERIC GRADE POINT EQUIVALENTS:
4.0-3.9 (A); 3.8-3.5 (A-); 3.4-3.1 (B+); 3.0-2.9 (B); 2.8-2.5 (B-); 2.4-2.1 (C+); 2.0-1.7 (C); 1.6-0.0 (E).

SPECIAL SYMBOLS:
A grade followed by an I indicates an incomplete was initially awarded but a final grade has been received. Prior to winter 1983, /R indicates that course was repeated and only the last grade will count in grade point average and credit is allowed once. Effective winter 1983 through summer 1985, /DR for a repeated course indicates that the first grade was less than a 2.0. Both grades will count in the grade point average, but credit will be allowed only once. /R indicates that the first grade was greater or equal to a 2.0 and the second grade does not count in the grade point average and credit is not allowed. Effective autumn 1985, /DR for a repeated course indicates both grades will count in the grade point average but credit will be allowed only once and X/R is used for an undergraduate indicating the student repeated a course not eligible to be repeated for grade or credit.

Effective winter 2005, /R indicates that a course is repeated. Grades for both courses are calculated in the grade point average. Grades for courses repeated more than once are not included in the grade point average. Credit is allowed only once.

Beginning autumn 1987, /R designates a foreign language course initially taken in high school and used as the language of admission. Credit is not allowed and the grade is not included in the grade point average.

Courses designated with /D indicate the grade counts in the grade point average but credit is not allowed toward degree requirements.

SCHOOL OF DENTISTRY:
Effective autumn 1992: Numeric grades: 4.0, 3.9, decreasing by 1/10 to 0.7. The highest grade is 4.0. Lowest passing grade is 0.7. Dental students taking medical school courses are allowed medical school grades.

Prior to autumn 1992: Numeric grades: 4.0 (honor), 3.7, 3.3, 3.0, 2.7, (good), 2.3, 2.0 (low pass), 0.0 (failure). Prior to spring 1981, letter grades: A (4.0), B (3.0), C (2.0), E (failure), EW (failure withdrawal), CR, NC, I, N, W.

SCHOOL OF LAW:
Effective autumn 1998, for entering first year Law students: Letter grades: A (4.0), A- (3.7), B+ (3.4), B (3.0), B- (2.7), C (2.0), D (1.0), E (0.0), CR (Credit); NC (No Credit); I (Incomplete); N (satisfactory without grade); W (Withdrawal); HW (Hardship Withdrawal - through winter 2020); RD (Registrar Drop) Beginning spring 2020 for undergraduate, graduate, and professional students, designates course(s) dropped after second week of the quarter and course(s) dropped after grades were posted. For Law students entering prior to autumn 1998: DS (Distinguished); H (Honors); P (Pass); LP (Low Pass); CR, NC, I, N, W, HW. Prior to 1990, numeric grades-credit awarded for grades 4.0 through 2.3; letter grades-CR, NC, I, N, *W, and W. GPA calc began Aut 05 for students (JD only) enrolled as of Spr 07.

SCHOOL OF MEDICINE:
Letter grades: H (Honors), S, NS, CR, NC, I, N, W. Effective autumn 1996; HP (High Pass), P (Pass), F (Fail) were added. Effective autumn 2002, S, NS were discontinued.

SCHOOL OF PHARMACY:
Numeric grades: 4.0, 3.9, decreasing by 1/10 to 0.7, 0.0. The highest grade is 4.0. Lowest passing grade is 0.7.

COURSE LEVEL:
Lower division, 100-299; upper division, 300-499; graduate 500 and above.

TRANSCRIPTS:
Most student records were converted to a new transcript system in winter 1983. You may receive two types of transcripts.

ACCREDITATION:
The University of Washington is accredited by the Northwest Commission on Colleges and Universities.

March 19, 2023

The Honorable Morgan Christen
Old Federal Building
605 West Fourth Avenue, Suite 252
Anchorage, AK 99501-2248

Re: Kate Walford

Dear Judge Christen:

I am very happy to recommend my former student and current research assistant Kate Walford for a judicial clerkship. She is an excellent student, a careful and thorough researcher, a successful and energetic leader and participant in a number of law school and community service groups, and a very promising plaintiff's civil rights lawyer. And, she is a deeply thoughtful and caring person, whom I have been very glad to get to know.

In her first semester of law school Kate was a student in my civil procedure course. She was an active participant in class discussions and was reliably well prepared and engaged by the material. I could count on her when discussion seemed to be missing a central point to help bring us back to where we belonged. In a very competitive group of students she wrote the best exam in the class, thus winning an American Jurisprudence award.

Kate is currently working with me as a research assistant, helping me on a book on the history of the idea of diversity. She has taken on some of the toughest research projects. For example, she is now deeply immersed in the literature on how the American "business case for diversity" crossed the Atlantic to be integrated into the European Union "diversity charters." This requires her to search for sources in several languages and collaborate with colleagues of mine from France, Belgium, Germany and Portugal who have volunteered to help. She has kept the research well organized and has been careful in her assertions. And she has not been afraid to push back against my assertions when she thinks they lack support. She is this making the work better.

Kates's grades put her within the top 10% of a very competitive class. And given the academic demands of law school and the challenge of being a student during the pandemic, it would be reasonable to expect her to be buried in her books. But outside of class Kate is an activist leader in one of our pro bono projects, the Worker's Rights Clinic; a volunteer with a local public interest NGO – Equal Rights Advocates; the co-president of one of our student organizations, the Berkeley Plaintiffs' Law Association; and a tutor (basically a teaching assistant) in our writing program.

In sum, Kate Walford is making her mark at Berkeley Law as a very strong student, an activist leader, and a participant in important scholarly, community, and service learning activities. I have every confidence that she will be an excellent lawyer, and (more to the point) an excellent law clerk. She has my highest recommendation.

Please feel free to contact me regarding this recommendation. I can be reached by email at doppenheimer@law.berkeley.edu or by phone (cell) at 510/326-3865.

Sincerely,

David B. Oppenheimer
Clinical Professor of Law

EQUAL RIGHTS
ADVOCATES
Fighting for Women's Equality

611 Mission Street, 4th Floor
San Francisco, CA 94105
Phone: 415.621.0672

www.EqualRights.org

May 15, 2023

Re: Letter of recommendation— Kate Walford

To Whom it May Concern,

I strongly recommend Kate Walford's application to clerk in your chambers.

Kate Walford was one of our school-term externs at Equal Rights Advocates ("ERA") for the entire 2023-2024 school year. Kate started as one of our strongest law clerks of the year (which, including summer 2023, totaled 14 clerks from top schools on both the West and East coasts), grew in her abilities and contributions consistently throughout her clerkship, and ended her clerkship as she had begun it and performed it throughout, as one of our strongest clerks of the year.

Kate is certainly a hardworking and dedicated student with a passion for justice. She holds a clear set of values based on both her life experience, which is more extensive and practical than most of her younger law clerk classmates, as well as rooted in her academic and intellectual worldview. Kate was frequently the first law clerk in the office on the designated extern office in-person day, Fridays, meeting or beating our incredibly punctual and dedicated law fellow to the office on most occasions. In fact, on her very first day with us she calmly and in what we learned is her usual soft and flexible but nonetheless matter-of-a-fact style called our legal assistant to figure out how to disarm the alarm system as she was the first to arrive at the office.

Since her first day, she has proven herself to be reliable, eager to volunteer for tasks, and equipped with a keen eye to identify potential litigation cases from our national Advice & Counsel ABA-designated warm-line. Of this entire school year, the impact litigation case we took on and the other case we seriously considered offering full representation for were from Kate's, and only Kate's, intakes.

Kate was the only law clerk who identified two cases ripe for litigation in her first semester with us. Both of these cases began as regular intakes for Kate. Typically, our law clerks present their intakes to their supervising attorneys, and sometimes our legal fellow, during our Direct Services Meeting. While we typically send our callers resources or represent them in only a limited capacity during their Title IX cases, two of Kate's cases were a right fit at the right time for consideration in our extremely limited litigation docket. The ability to seize these opportunities was assuredly due to Kate's excellent issue-spotting and presentation skills, her ability to distill and analyze information succinctly and quickly, and her readiness and willingness to immediately jump into follow-up tasks assigned by attorneys to further the possibility that we could consider the case and work up the matter within that window of opportunity.

EQUAL RIGHTS
ADVOCATES
Fighting for Women's Equality

611 Mission Street, 4th Floor
San Francisco, CA 94105
Phone: 415.621.0672

www.EqualRights.org

Although our other law clerks were wonderful and a welcome addition to our team, the fact stands that had another law clerk presented these cases in this year's cohort the clients likely would have received only our legal information services consisting of letters stating their rights and referrals to call in lieu of our direct representation due to our limited capacity and strategic impact-litigation approach/specifications, something we call an "Advice & Counsel Letter." Kate's acumen, succinct summary of the case, and fierce advocacy, aided the Legal Team to be able to take a deeper dive into the cases and determine their merits.

Kate has all of the skills necessary to be a successful law clerk, including advanced research and writing skills and fidelity to the details. Kate is quick to find the on-point cases when asked to produce research. She has the maturity necessary avoid overwhelm in a fast-paced environment and remain both flexible and practical as she plans her work.

We are proud of the work that Kate had produced as a law clerk and the way that she has adapted easily to our office. When Kate begins her summer at the Gibbs Law Group we know that she will flourish, gain deeper insight, and secure her hands around further skills in the long practice of law to which she has committed.

Should you have any questions, please contact me at mibrahim@equalrights.org or (510) 575-6728 to discuss Kate's candidacy for clerking.

Sincerely,

Maha Ibrahim
Senior Attorney, Litigation & Policy
Managing Attorney, End Sexual Violence in Education (ESVE) Program
Equal Rights Advocates

May 22, 2023

The Honorable Morgan Christen
Old Federal Building
605 West Fourth Avenue, Suite 252
Anchorage, AK 99501-2248

Dear Judge Christen:

I write to recommend Kate Walford for a clerkship in your chambers. Kate was one of the very top students in my 108-person Fall 2022 Evidence class, and I've gotten to know her outside of class because of her interest in litigation and clerking. I highly recommend her for a federal clerkship.

Kate was one of the top 4 students in my 108-person Evidence class, easily earning her a High Honors (top 10%) grade, based on a notoriously difficult multiple-choice exam and a policy essay. I usually don't add individual notes to my spreadsheet about exams while anonymously grading them, but on Kate's I wrote that she had a particularly good essay on Federal Rule of Evidence 609 (students tend to write on 609 often, and often regurgitate the same classic arguments against it, so when someone writes a 609 essay that is actually well written and not cliché, I tend to notice it). Kate wasn't a frequent speaker in class, but when she did speak, she was impeccably prepared and thoughtful. She was one of those quietly competent brilliant students who don't show off but then get a High Honors.

Given her performance in Evidence, it doesn't surprise me to learn that Kate has earned numerous High Honors (HHs) in other classes as well, both big and small. In particular, she earned the coveted Am Jur award (top grade in class) in Civil Procedure, and the Prosser Award (second highest grade in class) in an ethics seminar focused on practice. She was also an LRW tutor, a position offered only to those students who take writing seriously as a craft and who show potential to be great mentors. The fact that she has continued to take large difficult doctrinal classes, as well as labor-intensive electives like Advanced Legal Writing (which every student should take but few do), shows her academic and intellectual ambitions and her commitment to be the best litigator she can be upon graduation.

Unlike many other academic superstars, who are high achieving but unsure of their personal and professional goals, Kate is very clear-eyed about what interests her – plaintiff-side litigation, particularly employment and labor law. Her maturity in this regard is surely partly just her personality, but also partly a function of her unusual background; she has an advanced degree and worked for a full seven years in higher education administration and employment before law school.

Kate is also a lovely person who would be great to have in chambers. As I said, she is a bit understated, not bombastic, but also confident. She also clearly has a fun quirky side; I learned only through this process that she is a competitive roller derby participant (!).

In sum, Kate would be a great federal clerk. Please do not hesitate to contact me by cell phone, 202-669-6565, or e-mail, aroth@law.berkeley.edu, with any questions.

Very truly yours,

Andrea Roth
Professor of Law
UC Berkeley School of Law

KATE WALFORD – WRITING SAMPLE

This is a section of a brief written for the 2023 Roger J. Traynor California Appellate Advocacy Moot Court Competition. It is based on a case currently pending before the California Supreme Court, *Boermeester v. Carry* (2020) 49 Cal.App.5th 682, review granted September 16, 2020, S263180.

I wrote this section of the brief independently, and it has not been edited by anyone else. Per competition rules, my team received only broad global feedback regarding this brief from our competition coach. Also in accordance with competition rules, this brief complies with the California Style Manual.

I. INTRODUCTION

In 2017, University of Pacifica (PAU) student Peter Prescott was accused of assaulting fellow student Jane Roe. PAU investigated and adjudicated the matter using the institution's standard procedures for sexual misconduct allegations. At the time, California law required that a student accused of sexual misconduct be permitted to indirectly question the complaining witness in such proceedings. In accordance with this, PAU allowed Prescott to submit written questions to be asked of Roe. He declined to do so. Prescott was found responsible for the assault and sanctioned with expulsion.

Two years later in *Doe v. Allee* (2019) 30 Cal.App.5th 1036, 1039 (*Allee*), the California Court of Appeal for the Second District held that in certain circumstances, an accused student must be afforded an opportunity for live cross-examination of the complaining party and third-party witnesses in sexual misconduct proceedings. Prescott argues that the holding in *Allee* should be applied retroactivity to his 2017 proceeding, and that PAU failed to provide him with a fair hearing by depriving him of the opportunity for live cross-examination.

However, Prescott's argument must fail because of the enactment of Senate Bill 493. Senate Bill 493, which took effect in 2021, both overrule*s Allee's* requirement for live cross-examination and bars any retroactive application of the decision. Thus, the requirement for live cross-examination in *Allee* does not apply to Prescott's 2017 proceeding. Because PAU complied with the law in effect at the time, Prescott was provided with a fair hearing and this court should uphold the lower court's denial of his petition.

II. ISSUE PRESENTED

What effect, if any, does Senate Bill No. 493 (2019-2020 Reg. Sess.) have on the resolution of the issues presented by this case?

III. FACTS

[Full facts of the specific case have been omitted for brevity. After Prescott was expelled, he filed a petition for a writ of mandate against PAU in the California Superior Court, which was denied. Prescott appealed.]

IV. ARGUMENT

A. Senate Bill 493 both overrules *Doe v. Allee* and bars its retroactive application.

Senate Bill 493 (SB 493), now codified as California Education Code section 66281.8, was passed in 2020 and took effect January 1, 2021. The bill was largely a response to the U.S. Department of Education's 2018 proposed Title IX amendments and recent California Court of Appeal cases, both of which expanded upon the rights of the accused in university sexual misconduct proceedings.[1] SB 493 requires educational institutions in California to abide by certain procedures when adjudicating matters of sexual or gender-based violence. In doing so, SB 493 purposefully departs from the holding in *Allee* and eliminates the requirement for live cross-examination in such adjudications.

The enactment of SB 493 means that all case law on which Prescott relies to assert a right to live cross-examination does not apply. First, section 66281.8(g)(2) explicitly states that the statute overrules all case law conflicting with its provisions. Because SB 493 leaves the decision to provide live cross-examination to the discretion of educational institutions, case law requiring live cross-examination conflicts with the statute and is thus overruled. Second, section 66281.8(g)(1) provides that such case law shall have no retroactive effect. Because the

[1] In 2018 and 2019, several California Courts of Appeal issued decisions expanding upon the rights of accused students in campus sexual misconduct proceedings. See *Doe v. University of Southern California* (2018) 29 Cal.App.5th 1212; *Doe v. Claremont McKenna College* (2018) 25 Cal.App.5th 1055; *Doe v. Regents of University of California* (2018) 28 Cal.App.5th 44; *Doe v. Allee* (2019) 30 Cal.App.5th 1036. Building upon this line of cases, *Doe v. Allee* most clearly establishes the requirement for live cross-examination.

proceeding in this case occurred before the court in *Allee* announced a requirement for live cross-examination, *Allee* cannot apply retroactively to the case at hand. Finally, section 66281.8(g)(1) is a valid provision because the California Constitution permits the state legislature to proscribe retroactivity of case law.

1. *Doe v. Allee*'s requirement for live cross-examination conflicts with SB 493 and is thus overruled.

Education Code section 66281.8(g)(2) states: "Any case law that conflicts with the provisions of the act that adds this section shall be superseded as of this statute's effective date." This provision unambiguously overrules any case law which conflicts with the provisions of the statute. While recent case law on which Prescott relies provides a requirement for live cross-examination in some circumstances, Section 66281.8 does not confer a right to live cross-examination in any circumstances, and leaves the decision to employ this procedure to the educational institution. Because this case law directly conflicts with the statute, it is overruled by section 66281.8(g)(2).

a. SB 493 does not provide for live cross-examination of witnesses.

In interpreting statutes, the court first looks to the plain language. (*Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1238.) If the plain language of the statute is ambiguous, or susceptible to more than one meaning, the reviewing court looks to legislative history to determine the legislature's intent. (*Sand v. Superior Court* (1983) 34 Cal.3d 567, 570.) Here, the plain meaning of the statute indicates that live cross-examination is not required. Even if the court were to find the language ambiguous, the legislative history shows an intent to eliminate any common law right to live cross-examination in these adjudications.

i. The plain meaning of SB 493 does not provide for live cross-examination of witnesses.

Education Code section 66281.8 states, in pertinent part,

"[grievance procedures] shall provide that the institution shall decide whether or not a hearing is necessary to determine whether any sexual violence more likely than not occurred. In making this decision, an institution may consider whether the parties elected to participate in the investigation and whether each party had the opportunity to suggest questions to be asked of the other party or witnesses, or both, during the investigation. Any hearing shall be subject to the following rules:

(I) Any cross-examination of either party or any witness shall not be conducted directly by a party or a party's advisor.

(II) Either party or any witness may request to answer the questions by video from a remote location."

(Ed. Code, § 66281.8(b)(4)(A)(viii).) This section clearly grants the *institution* the authority to decide if a hearing shall occur. Because cross examination at a live hearing can occur only if a hearing is offered, it logically follows that in making this determination, the institution also determines whether or not live cross-examination will occur. Additionally, the fact that the institution may consider "whether each party had the opportunity to suggest questions to be asked of the other party or witnesses, or both, during the investigation" indicates that it would be permissible for an institution to provide an alternative way for the parties to submit questions for one another, rather than through a live hearing. (*Ibid.*) Finally, the use of the word "Any" before "hearing" and "cross-examination" indicates that these are not required elements of adjudications, and thus the statute does not provide this right. (*Ibid.*)

ii. Legislative history indicates that SB 493 was designed to alter *Doe v. Allee*'s requirement for live cross-examination.

The legislative history of SB 493 shows a dissatisfaction with recent case law and the Department of Education's proposed amendments to Title IX, both of which increased procedural protections for accused students in sexual misconduct proceedings. (See *supra,* fn. 1.) The legislative record states, "[SB 493] is also designed to be responsive to recent court

decisions that have elaborated on respondents' rights within the context of campus-related sexual harassment and violence complaints," (Sen. Judiciary Com., Rep. On Sen. Bill No. 493 (2019-2020 Reg. Sess.) as amended Feb. 21, 2019, p. 1.) The record was critical of the Department of Education's proposed amendments, stating that they "implicitly equate Title IX hearings with criminal cases" and "seem to be especially preoccupied with protecting the alleged perpetrator" as opposed to concern for the victim. (*Id.* at 7; Department of Education Notice of Proposed Rulemaking, 83 Fed. Reg. 61462 et seq. (November 29, 2018).)

The legislature also explicitly considered and decided against requiring live cross-examination in the text of SB 493. While initial legislative history indicates a desire to keep SB 493 in line with recent case law, subsequent records indicate an express decision to depart from these standards. A July 2019 report states, "This bill seeks to codify . . . the standard provided by *Doe v. Allee* to provide a uniform procedural baseline." (Assem. Com. On Judiciary, Rep. On Sen. Bill No. 493 (2019-2020 Reg. Sess.) as amended May 17, 2019, p. 14.) Subsequent drafts of the bill language required institutions to "provide both parties the opportunity, during the hearing, to cross-examine one another and any witnesses against them," and stated that "cross-examination shall be live. . . ." (Sen. Bill No. 493 (2019-2020 Reg. Sess.) as amended May 17, 2019.)

But in August 2020, the Assembly amended the bill to "delete the requirement that grievance procedures provide student parties the opportunity to cross-examine one another and any adverse witnesses, and instead require grievance procedures to include reasonable and equitable evidentiary guidelines." (Sen. Rules Com., Office of Sen. Floor Analyses, Analysis of Sen. Bill No. 493 (2019-2020 Reg. Sess.) as amended Aug. 24, 2020, p. 2.) After this amendment, the bill was codified to read as it does today. This change in bill language shows an clear intent to modify the current common law requirements set by *Allee*; the legislature was

aware of the decision in *Allee* requiring live cross-examination and chose before enacting SB 493 to change the statutory language to conflict with this precedent.

Because the plain language of the SB 493 does not provide for live cross-examination and legislative history confirms an intent to depart from the holding in *Allee*, the requirement for live cross-examination conflicts with SB 493 and us thus overruled by section 66281.8(g)(2).

2. *Doe v. Allee* cannot apply to the case at hand because SB 493 prohibits its retroactive application.

Even if the requirement for live cross-examination in *Allee* does not conflict with SB 493, the statute also prohibits the retroactive effect of such case law, making it inapplicable to the case at hand. Education Code section 66281.8(g)(1) states:

> "Any case law interpreting procedural requirements or process that is due to student complainants or respondents when adjudicating complaints of sexual or gender-based violence, including dating or domestic violence, at postsecondary educational institutions in the State of California shall have no retroactive effect."

Thus, *Allee*'s requirement for live cross-examination of witnesses cannot be applied to adjudications which predate these decisions. The proceedings at issue occurred in 2017. This requirement was developed through cases decided in 2018 and 2019. (See, e.g., *Allee, supra,* 30 Cal.App.5th 1036.) Therefore, the requirement for live cross-examination of witnesses cannot be applied to the instant case. Instead, the question of whether Prescott received a fair hearing must be resolved based on the requirements set by case law at the time his proceeding occurred.

a. Case law at the time of the proceeding did not require live cross-examination of complaining or third-party witnesses.

In 2017, the standard for a fair hearing in such adjudications was set by *Doe v. Regents of University of California* (2016) 5 Cal.App.5th 1055 (*UCSD*). The court in *UCSD* held that "there is no requirement under California law that, in an administrative hearing, an accused is entitled to cross-examine witnesses." (*Id.* at 1084.) Rather, the court held only that when credibility and

severe sanctions were at issue, a school must provide a process where the accused can indirectly question the complainant. (*Ibid.*) The court did not provide a right to live questioning of the complainant or a right to question any third-party witnesses. PAU thus complied with the requirements of *UCSD* by permitting Prescott to submit written questions to be asked of Roe, the answers to which would become a part of the evidentiary record. (*Ibid*.; RT 297.)

3. The California legislature has the authority to restrict retroactive application of the holding in *Doe v. Allee*.

The California Constitution permits both the courts and the legislature to proscribe retroactive application of a judicial decision. (*Los Angeles County v. Faus* (1957) 48 Cal.2d 672, 681.) Legislative restrictions on the retroactivity of case law are permissible when they are reasonably designed, in light of the situation presented to the legislature, to mitigate hardships caused by reliance on previously settled law. (*Forster Shipbuilding Co. v. Los Angeles County* (1960) 54 Cal.2d 450, 459 (*Forster*); *Atlantic Richfield Co. v. County of Los Angeles* (1977) 68 Cal.App.3d 105, 115.) A legislative decision to proscribe retroactivity is subject to judicial review for reasonableness only – where a reasonable basis to proscribe retroactivity exists, it "may not be disturbed by the reviewing court." (*Schettler v. County of Santa Clara* (1977) 74 Cal.App.3d 990, 999 (*Schettler*).)

In *Forster*, the California Supreme Court held that the legislature could bar the retroactive application of a judicial decision which would cause unexpected financial hardship. (*Forster, supra*, 54 Cal.2d 450, 459.) The California Supreme Court had recently struck down a provision of the tax code which provided tax deductions to lessees of government property. (*Id.* at 453.) If applied retroactively, the decision would have imposed an unexpected tax burden on individuals who had relied on the exemption when making their leases. (*Id.* at 453, 459-460.) In response, the legislature enacted a statute under which the new decision would apply only to new

leases. (*Id.* at 453.) The court found the legislature's action permissible because it was reasonably designed to mitigate hardships; it was designed to address the unexpected tax burdens of those who relied on the tax provision before it was struck down. (*Id.* at 459-460; See also *Schettler, supra,* 74 Cal.App.3d 990, 998 [upholding legislative bar on retroactive application of a judicial decision where importers had relied on previous state of the law and retroactive application would cause many of them to become insolvent, relocate, or go out of business].)

In contrast, in *Lewis v. City of Hayward* (1986) 177 Cal.App.3d 103, 115 (*Lewis*), the California Court of Appeals for the First District held that the legislature could not proscribe retroactivity of a judicial decision where there was no reliance interest on a previous state of the law. After a California Supreme Court decision made certain land contracts with the government more difficult for private landowners to cancel, the California legislature enacted a statute which provided a one-time "window provision" opportunity for landowners to easily get out of such contracts. (*Id.* at 106-107.) Because the Supreme Court's decision was the first case to address these particular contracts, it had not overruled any existing law on which there could have been reliance. (*Id.* at 115.) Additionally, the statute did not simply continue a former rule for those who had relied upon it, as had been the case in *Schettler*. Rather, it "provide[d] a windfall rather than equitable relief from a change." (*Ibid.*) The court therefore held that the legislature's "window provision" was impermissible because it was not truly an effort to mitigate hardship. (*Ibid.*)

a. SB 493 is reasonably designed to mitigate hardships caused by reliance on a previous state of the law.

Like in *Forster*, SB 493's bar on retroactive application of judicial decisions reasonably mitigates the hardship to educational institutions created by reliance on the state of the law before *Allee*. (See *Forster, supra,* 54 Cal.2d 450, 459.)

i. Educational institutions relied on a previous state of the law in deciding not to provide live cross-examination.

Like the lessees in *Forster* had relied on a statutory tax exemption in making leases, here educational institutions relied on case law in creating their sexual misconduct adjudication procedures. (See *id.* at 453, 459-460.) Unlike *Lewis*, several judicial opinions had addressed the issue prior to *Allee,* and explicitly held that no live cross-examination was required in such sexual misconduct adjudications. (See *Lewis, supra*, 177 Cal.App.3d 103 at 115.)

In 2016, the California Court of Appeals for the Fourth District held that "there is no requirement under California law that, in an administrative hearing, an accused is entitled to cross-examine witnesses." (*UCSD, supra*, 5 Cal.App.5th 1055, 1084.) That same year, the Second District noted that alternatives to live cross-examination were permissible in these proceedings, citing with approval a method in which the complaining student's testimony was recorded and provided to the accused student after completion. (*Doe v. University of Southern California* (2016) 246 Cal.App.4th 221, 245 fn.12 (*USC*).) Educational institutions crafting their policies and procedures relied on these decisions. For example, PAU complied with these decisions by allowing accused students to submit questions for the complaining witness, the answers to which would be available to the accused student and a part of the evidentiary record (RT 297.)

ii. Applying *Doe v. Allee* retroactively would create significant hardship for educational institutions.

After *Allee* was decided in 2019, accused students did in fact attempt to apply its holding retroactively. Several cases were brought arguing that sanctions issued by schools before 2019 should be set aside by the court because live cross-examination had not been provided. (See *Doe v. Westmont Coll.* (2019) 34 Cal.App.5th 622; *Doe v. Occidental College* (2019) 40 Cal.App.5th

208; *John Doe v. Saint Mary's College of California* (Cal. Ct. App., May 8, 2020) No. A155425, 2020 WL 2297189 [all asking the court to apply the requirements of *Allee* to proceedings which occurred before 2019].) This even included a class action brought by former students at California State University who had been disciplined in hearings between 2015 and 2019. (See *Doe v. White* (Cal. Ct. App., May 17, 2022) No. B307444, 2022 WL 1552601 [class allegations ultimately struck from writ petition because individual issues predominated].)

Like in *Forster* and *Schettler*, the ability to challenge any pre-*Allee* sanction by alleging that a school failed to provide live cross-examination would place several unexpected burdens on educational institutions. (See *Forster*, *supra*, 54 Cal.2d 450, 459; *Schettler*, *supra*, 74 Cal.App.3d 990, 999) This would create financial hardship by forcing institutions to spend significant funding (including taxpayer funds at public schools) on litigation defending procedures used prior to *Allee*, created in reliance on *UCSD* and *USC*. (See *UCSD*, *supra*, 5 Cal.App.5th 1055, 1084; *USC*, *supra*, 246 Cal.App.4th 221, 245 fn.12.) If such litigation is successful, institutional findings of responsibility for sexual misconduct would be set aside by courts for the sole reason that live cross-examination was not provided, no matter how substantial the evidence or how pressing of a danger the student presents.

Institutions would then be faced with the decision to either reinstate the student or offer a new proceeding which includes live cross-examination. Both options present significant burdens. Reinstatement of a student who has engaged in sexual misconduct may threaten the safety and well-being of other students by exposing them to the threat of repeated behavior. Offering a new proceeding would create additional financial and logistical hardships. These proceedings are time-intensive; the investigation and proceeding at issue took two months to complete, involved interviews of 16 witnesses, and culminated in a 78-page report. (RT 1-78.) A new proceeding

may also be impracticable if witnesses are no longer enrolled and would take an enormous toll on the complaining student, who would be required to undergo these traumatic proceedings for a second time.

iii. SB 493's bar on retroactive application of *Doe v. Allee* is reasonable.

In light of the attempts to apply the holding in *Allee* retroactively, it was reasonable for the legislature to determine that educational institutions would face significant hardship because of their reliance on *UCSD* and *USC*. SB 493 is reasonably designed to prevent these hardships. Unlike *Lewis*, SB 493 does go beyond simply barring retroactivity and provide a "windfall" to any party. (See *Lewis*, *supra*, 177 Cal.App.3d 103 at 115.) Rather, like in *Forster* and *Schettler*, SB 493 simply continues the previous state of the law under *UCSD* for those who relied on it prior to the holding in *Allee*. (See *Forster*, *supra*, 54 Cal.2d 450 at 459-460; *Schettler*, *supra*, 74 Cal.App.3d 990 at 998.)

Because the legislature designed SB 493 to reasonably alleviate hardship to educational institutions borne of their reliance on case law before *Allee*, the court may not disturb its decision and Education Code section 66281.8(g)(1) must be upheld.

V. CONCLUSION

Under these two provisions of SB 493, there is now no case law supporting a right to live cross-examination in this case. Under section 66281.8(g)(2), case law requiring live cross-examination is overruled because it conflicts with the statute. Even if a conflict were not found, such case law may not apply retroactively under section 66281.8(g)(1), and thus cannot apply to Prescott's 2017 proceeding. Applying the case law in effect at the time, PAU was required only to provide some process where the accused could indirectly question the complainant. Because PAU complied with this requirement, Prescott received a fair hearing.